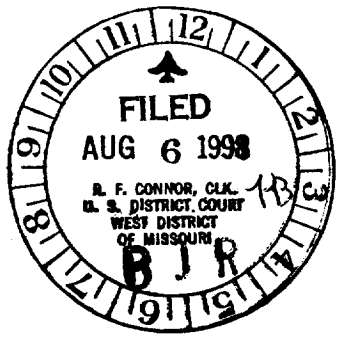
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION



B. JEAN WEBB,)
Plaintiff,)
)
v.) Case No. 98-3306-CV-S-RGC
)
CITY OF REPUBLIC, MISSOURI,)
Defendant.)

PLAINTIFF'S REPLY TO DEFENDANT'S MOTION FOR RELIEF FROM ORDER AND DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO AMEND COMPLAINT

On or about July 30, 1998, defendant filed a Motion for Relief from Order[1] along with a Response to Plaintiff's Motion to Amend Complaint (hereafter "Defendant's Response"). Plaintiff opposes defendant's Motion for Relief from Order.

Although the court did grant plaintiff's motion to amend before the expiration of the 12 days allowed by Local Rule 7.1(e) for filing reply suggestions, the court should deny defendant's Motion for Relief from Order because the defendant's reasons for opposing amendment of the complaint lack merit and teeter on the brink of being frivolous.

In its Response to Plaintiff's Motion to Amend Complaint, defendant asserts--without citing any authority for the proposition--that plaintiff's motion to amend should

[1] Defendant has mistakenly based its Motion on Rule 60(b), which governs motions for relief from final judgments but does not apply to interlocutory orders like the order granting plaintiff's motion to amend the complaint. Fayetteville Investors v. Commercial Builders Inc., 936 F.2d 1462 (4th Cir. 1991). Courts may reconsider interlocutory orders at any time before the entry of final judgment. Rule 54(b), Fed. R. Civ. P.; Beeman v. Safeway Stores, Inc., 724 F. Supp. 674, 679 (W.D. Mo. 1989).

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be denied because plaintiff has failed to prove that justice "requires" an amendment, which defendant asserts is "something of a threshold for the moving party." Defendant's Response at 1. But there is no such "threshold," and a plaintiff's failure to explain the reasons for seeking an amendment of the pleadings is not sufficient reason to deny leave to amend. Halliburton & Associates, Inc. v. Henderson, Few & Co., 774 F.2d 441, 443-444 (11th Cir. 1985).[2] Acceptance of defendant's "contention on this point would subvert the basic purpose of [Rule 15(a)]," United States v. Hougham, 364 U.S. 310, 317, 81 S.Ct. 13, 18 (1960), which is to assure that district courts grant amendments "liberally" and "freely," Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962).

In addition, defendant argues that it "will in fact be unduly prejudiced should the Court grant Plaintiff's motion."[3] Defendant's Response at 2. Specifically, defendant bases its claim of prejudice on the alleged loss of "a very real chance to utilize insurance coverage for the claims in this case." Id. Again, defendant cites no authority for this novel proposition, and in fact loss of insurance coverage is not the kind of harm that would justify the denial of a motion to amend. For purposes of Rule 15, prejudice means the denial of a fair opportunity to defend. Evans Products Co. v. West American Insurance Co., 736 F.2d 920, 924 (3d Cir. 1984). Amendment of the complaint at this stage of the litigation (less than one month after the filing of the complaint) will in no way hinder defendant's ability to present a vigorous defense to plaintiff's claims.

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[2] If one is required, the reason for the amendment was that plaintiff's counsel included the prayer for damages out of an abundance of caution, and plaintiff subsequently advised counsel she did not want to seek money damages.

[3] Defendant has the burden of showing prejudice. Beeck v. Aquaslide 'N' Dive Corp., 562 F.2d 537, 540 (8th Cir. 1977).

Defendant also contends that it will be prejudiced if plaintiff is allowed to allege harm without seeking monetary damages. Defendant's Response at 3. In paragraph 13 of both the original and amended complaints, plaintiff alleges that defendant's use of the fish symbol in its City seal caused plaintiff to suffer distinct and palpable harm. Such an allegation is necessary regardless of the relief sought because actual harm is required in order for the plaintiff to have standing to sue defendant for alleged violations of the First Amendment's Establishment Clause. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472, 102 S.Ct. 752, 760 (1981). Thus, contrary to defendant's arguments, there is nothing inconsistent or impermissible about plaintiff's alleging actual harm and seeking injunctive and declaratory relief but not monetary damages.

At bottom, defendant seems to be taking the unusual position that plaintiff should be compelled to seek monetary damages from defendant because the demand in the original complaint sought such damages. In other words, defendant contends that the "original complaint constituted an irrevocable election of remedies[.]" United States v. Hougham, 364 U.S. at 316, 81 S.Ct. at 18. This position is contrary to the basic intent and spirit of the Federal Rules of Civil Procedure. Under the "well-pleaded complaint rule" of Rule 8(a), "the plaintiff [is] the master of the claim[.]" Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 2429 (1987). "The liberal policies reflected in Rules 15(a) and 15(b) permit the demand to be amended either before or during trial." 5 Wright & Miller, § 1255 (West 1990). See also 6 Wright, Miller & Kane, § 1474 (West 1990). Applying these liberal rules of pleading, courts have long

permitted plaintiffs to amend their demands. E.g. United States v. Hougham (adding claim for damages); Hurst v. U.S. Postal Serv., 491 F. Supp. 870 (W.D. Mo. 1980) (increasing back pay demand); Fischer & Porter Co. v. Brooks Rotameter Co., 86 F. Supp. 502, 503 (E.D. Pa. 1949) (deleting prayer for "other and further relief"); Lieberman v. Merkin, 2 F.R.D. 315 (E.D. Pa. 1940) (eliminating prayer for relief by way of injunction and profits); Pro Medica, Inc. v. Theradyne, 331 F. Supp. 231 (D.P.R. 1971) (decreasing damages demanded); and Troutman v. Modlin, 353 F.2d 382 (8th Cir. 1965) (increasing demand after jury returned verdict in excess of demand).

For these reasons, the court should deny defendant's Motion for Relief from Order and allow the plaintiff's First Amended Complaint to stand.

Respectfully submitted,

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ATTORNEY FOR PLAINTIFF

Certificate of Service

I certify that, on August 12, 1998, a copy of the foregoing document was mailed, postage prepaid to: David R. Huggins, National Legal Foundation, PO Box 341283, Memphis, TN 38184-1283, and James M. Kelly, 316 West Hwy. 60, PO Box 327, Republic, MO 65738, Attorneys for Defendant.